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Supreme Court of the United States

October Term, 1965

No. 896

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SUPREME COURT, U.S.

JOSEPH ABRAMS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

The Government concedes in its brief that the official reports of IRS indicate "that there was no tax due for 1952", the year upon which judgments of conviction for tax evasion were entered, that IRS "in reliance upon these reports, refunded to petitioner the amounts it had collected from him after his guilty plea" and further that IRS concluded that there was "no fraudulent conduct on the part of petitioner" (Govt. Mem., pp. 6, 3). But, the United States concludes, even these official findings and the substantial cash refund made thereon do not compel a hearing on the question of whether petitioner owed no taxes for the year named in the indictments because, it contends, these official acknowledgments were based "upon unverified documents" which were "patently insufficient to prove that petitioner had no substantial deficiency for 1952" (Govt. Mem. pp. 6-7). To buttress its position the Government relies, as did the courts below, upon ex parte affidavits of IRS Intelligence Agents who did not participate in the supplemental audits which resulted in the finding that petitioner owed no taxes for 1952, but who at a subsequent date "read the papers" submitted by petitioner in support of his application for writ of error *coram nobis* and those of the Government submitted in opposition on the basis of which they "found no basis for changing [their] original findings" (109a-110a, 112a-113a).

The Government manages to ignore, however, the following salient facts: that the reports which found "no tax due" from petitioner were prepared by Revenue Agent Blacher, an IRS Field Audit Group Supervisor of eighteen years experience, who had made the prior audits which resulted in petitioner's indictments and convictions (87a-88a); that these reports were thereafter reviewed by Leo Gellens, a "Senior Reviwer in the Manhattan District" for "about seventeen years" (96a) and by Alex Denkenson, an Internal

Revenue employee for "some eighteen and one-half years" who had been assigned to the Review Section for "approximately fifteen years" (97a); that both of these experienced officials of IRS passed upon and approved the Revenue Agent's report which Mr. Denkenson himself noted "reversed the findings of a previous audit report * * * to the extent of eliminating the tax liability and fraud penalty" (98a); that at no time did either of these officials reject or question the Revenue Agent's report on the ground that it was based upon unverified documents, nor did they question any single finding on the ground that there was further verification needed although one of Mr. Denkenson's specific functions was to determine whether "a factual determination is made without adequate explanation" (97a); that both of these experienced IRS officials fully accepted and approved Revenue Agent Blacher's supplemental audits which "resulted in my reversing my findings of the audit which was the basis of a criminal prosecution against [petitioner]" (89a), although it was plainly noted that the finding that petitioner's "tax returns as originally filed were correct" related to "a year under indictment" (Exh. opp. 64a); and that, before petitioner could receive the substantial cash refunds which were admittedly made to him by IRS, the matter must necessarily have passed after review by agents Gellens and Denkenson, to the Post Review Section, been approved by the Fraud Section and finally passed upon by the District Director's Office.

We have said before and are compelled to repeat that it is not credible that all of the foregoing painstaking review by these various levels of IRS, resulting in the payment of *substantial cash refunds* to petitioner could have occurred, without the least question being raised, if the finding "that there was no tax due for 1952" had been based on "unverified documents" as the Government now claims on this proceeding.

Moreover, the Government's contention that the supplemental audit was based upon "patently insufficient" documents was hotly disputed below. Petitioner stated that he had supplied Agent Blacher with detailed documentation in support of the deductions previously disallowed (103a-104a), which petitioner offered to resubmit to the District Court at a full hearing of the matter (104a, 106a, 117a). In his sworn affidavit elicited and submitted by the Government, Blacher stated as follows:

> "Portions of the aforesaid records were submitted to me by Mr. Abrams and left with me by Mr. Abrams, and I forwarded these records to the Review Section along with my report. * * * These records submitted to the Review Section were in an accountant's bound ledger book with the supporting documents stapled to the pages." (93a)

Petitioner submitted the affidavit of Murray Berman who stated that at petitioner's request in March, 1963, he had gone to the office of IRS at 484 Lexington Avenue, New York City, where he picked up a large packet of papers from Revenue Agent Leo Gellens (147a-148a), who, as already noted, reviewed Agent Blacher's reports. Annexed to the Berman affidavit was a letter from petitioner to IRS, attention of Mr. L. Gellens, in which return of the Exhibits supplied by appellant was requested (149a), and in response to which Agent Gellens did return to Mr. Berman the documents which had been submitted to IRS.

Now, three years after official acknowledgment by IRS that petitioner owed no taxes for the years named in the indictments, and three years after substantial refunds had been made on the basis of those acknowledgments (142a-146a), during which period no question was raised by anyone as to the propriety of either the IRS notifications or the cash refunds, the United States claims that petitioner has not even the right to a hearing on the question of

whether the IRS finding was not the result of careful and deliberate consideration of a fully documented record.

We submit that if there was anything irregular about the conduct of Revenue Agent Blacher, or about the supplemental audits he conducted which "resulted in my reversing my findings of the audit which was the basis of a criminal prosecution against Mr. Abrams" (89a), as the Government has implied,* or if indeed there were irregularities throughout the entire IRS review structure which approved those audits and the refunds made thereon, this matter can be brought out only through a hearing and cannot be resolved upon the ex parte affidavits of other government officials. *Walker* v. *Johnston,* 312 U.S. 275, 285-7

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* In its memorandum the Government stresses that:

1. Blacher admitted that he had once "purchased stock in a corporation in which petitioner had an interest";
2. The Assistant United States Attorney who elicited Blacher's affidavit found him "very difficult to work with"; and
3. Although not shown in the record, Blacher has allegedly resigned from IRS which has "rescinded all action taken in reliance on Blacher's reports and is now attempting to recollect substantial deficiencies from petitioner for 1952" (Mem., p. 7).

In his affidavit below, petitioner denied that he had anything whatsoever to do with Blacher's investments in any corporations and that the investment which Blacher claimed to have made came at a time when Blacher's audit showed that petitioner owed many hundreds of thousands of dollars in taxes on the basis of which he was subsequently indicted and convicted (104-106). As to the assertion that a Government witness was "difficult to work with", we can only say that this further emphasizes the need for a full hearing on this matter. Nor should the Government's attempt to institute further proceedings against petitioner for alleged deficiencies for the year 1952 deny him a hearing. It may be noted that late last year the Government levied two jeopardy assessments against Mr. Abrams, one for $1,406,834.25 and the other for $230,428.43, predicated upon a claimed tax liability on his part as alleged transferee of assets in the tax year of 1956. Subsequently, on November 3, 1965 an order was signed by Judge RAUM which "ordered and decided that there is no liability due from [Mr. Abrams] the petitioner." The Government consented to the entry of that order notwithstanding it had caused the foregoing enormous assessments to be levied against petitioner.

(1941); *United States* v. *Kendrick*, 331 F. 2d 110 (4 Cir. 1964). Moreover, neither Revenue Agent Blacher nor the two reviewers who approved his reports, Agents Gellens and Denkenson, nor the District Director who passed upon the refunds, have ever stated that the findings concededly made by Blacher that "there was no tax due for 1952" and that there was "no substantial understatement of taxes and no fraudulent conduct on the part of petitioner" (Govt. Mem. pp. 6, 3) were wrong.

Suppression of Relevant IRS Files

Several other points in the Government's memorandum require, to say the least, some clarification. The Government contends that petitioner "cannot now complain" that files of IRS relating to the supplemental audits and petitioner's refund claims were not made available to him in the District Court (Mem. p. 8), because petitioner's counsel stated that he wanted the files placed in the possession of the Court and not in his possession. The Government's argument is disingenuous. The files referred to were subpoenaed by petitioner (79a-82a). On the return of the motion, the Government contended that petitioner had not shown that the subpoenaed materials were relevant to his application, nor that they could not be obtained elsewhere (44a), although it conceded that the files included "work papers" relating to the audits of petitioner's returns (41a) and "work papers and records of agents" relating to the official IRS acknowledgments that petitioner's returns as "originally filed were correct" (42a). Petitioner disclaimed intent to rummage indiscriminately through IRS files and suggested that in the first instance they be placed in the possession of the Court so that it might see that the official notifications received by petitioner were necessarily and "deliberately done after the most careful investigation" and were fully supported by work sheets and other

factual data (34a).* The District Court received the subpoenaed files with the avowed purpose of determining whether anything "exculpatory" of petitioner was contained therein (54a-55a) and specifically noted that it was the Court's "function" and "responsibility" to look at those files (55a). Nevertheless, as the correspondence between petitioner's counsel and the Court made clear, *the subpoenaed files were not considered at all by the Court in dismissing petitioner's application* (127a-132a; see Pet., pp. 20-22).

Petitioner did not cease his efforts to obtain access to the subpoenaed materials when they were placed in the Court's possession (106a). Even after the decision counsel implored the court to grant petitioner access to the files on which the Court's decision *appeared* to be based until it was made clear that the files had not been considered at all (127a-132a). In fact, petitioner submitted a proposed counter-order, which was not signed, which would have directed that the files "remain in custody of the Clerk of this Court pending applicant's appeal from this order, so that said file may be made available upon the submission and argument of said appeal, or until the time to appeal from this order has expired" (135a). On the basis of this record, the Government's contention that we have waived our objection to the failure to produce subpoenaed IRS files is entirely without merit. We sought and still seek to examine the files and place them before the Court pre-

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* Counsel said to the Court:

> "But we felt that in an important application of this kind, in order to show that the conclusion that the Government reached in these formal documents was not the result of error, not the result of haste, not the result of some other considerations that had nothing to do with the merits, we wanted to have before your Honor on this rather important application the basic documents which will show that the Government reached this conclusion after following, every conceivable procedural step which it was necessary to take, and the few documents that they have would show that." (29a-30a)

cisely to overcome the objection of the Government in its Memorandum that the IRS official acknowledgments of "no tax due" were based on "insufficient" documentation.

The Guilty Pleas

The Government further contends that petitioner, by his guilty pleas, admitted "that he had evaded a *substantial* amount of taxes" and that "there is nothing in the record to support petitioner's assertion that he was forced to plead guilty because the circumstances prevented adequate preparation for trial" (Mem., pp. 2, 5). Under the circumstances of petitioner's incarceration at the time the pleas were entered, which is fully detailed in the affidavits below (59a-61a), it is quite clear that petitioner was not able to exercise "that free will essential to a reasonable choice" which a plea of guilty must represent if the conviction entered thereon is to be legitimate. *United States* v. *Tateo,* 214 F. Supp. 560, 565 (S.D. N.Y. 1963). The fact that it took petitioner some three years after his release to gather the records necessary for his exoneration (61a-62a), and the great complexity of this task (103a-104a), clearly evidences the impossibility of preparing, while in prison, an adequate defense to these indictments which charged petitioner with evading personal income taxes for the year 1951 of $241,660.15, and corporate income taxes for the same year of $488,048.31, and with evading personal and corporate income taxes respectively of $29,374.04 and $3,954.71 for the year 1952 (139a-142a);* so too does the fact that it took the Government some three years after that to acknowledge officially that "the tax returns as originally filed were correct" (Exh. opp. 64a) and to pay to petitioner the cash refunds due him. So too does the fact that the Government had and may still have in its possession corporate records

* Indeed, at the very time of sentence the District Court recognized that there existed a genuine dispute as to the amount of tax claimed (59a-61a).

necessary to defend against the tax charges (60a, 104a), some of which were turned over to petitioner as late as March, 1965, pursuant to order of MISHLER, D.J., in a civil case in the Eastern District of New York.

The Government implies that petitioner pleaded guilty to evading taxes for the year 1952 in exchange for a dismissal of those counts of the indictments which charged evasion of personal and corporate income taxes for the year 1951 (Mem. p. 6). It was exactly to avoid this claim that petitioner offered below to demonstrate, on the basis of official acknowledgments by IRS and the factual data upon which such acknowledgments were based, that for the year 1951 as well "the tax returns as originally filed were correct" (Exh. opp. 64a). Although petitioner sought to convince the Court that the guilty pleas were not made in order to avoid prosecution for another tax year also named in the indictments, and sought vindication as to that tax year as well (12a-15a), the District Court ruled that it would not "hear anything relating to the 1951 returns" (15a). Government counsel's objection below that 1951 was "irrelevant" (42a), and the District Court ruling prevented petitioner from establishing the very thing it is now claimed is lacking in petitioner's presentation.

Petitioner's Prior Conviction

Although not explicitly offered as a ground for denial of this petition, nevertheless, the Government makes frequent reference to the fact of petitioner's prior conviction. This diversionary tactic, apparently successful below (see Pet.'s Appendix, p. 32, n. 1), is readily overcome and should in fact be decried.*

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* In the words of Judge JEROME FRANK:

> "Succumbing to the temptation to consider other defeats suffered by a party may lead a court astray; see, e.g., *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 489, 39 S. Ct. 533, 63 L. Ed. 1099, note 1." *Arnstein* v. *Porter*, 154 F. 2d 464, 475 (2 Cir, 1946)

We must note that a *coram nobis* application is being prepared in respect of the foregoing conviction on the basis of newly discovered evidence which had been suppressed at trial by the Government and we invite attention to the following facts: the case of *United States* v. *Fabric Garment Co.*; 262 F. 2d 631 (1 Cir. 1958), cert. denied 359 U.S. 989 (1959), involved the manufacture of Eisenhower jackets under four Government contracts entered into on January 5, March 10, December 3 and December 28 of 1951. The amount of Government cloth totalled some 719,000 yards. From this cloth 454,814 Eisenhower jackets were delivered, and *at no time did the Government claim any failure to deliver jackets in quantity, quality or workmanship as called for under the contracts.** Criminal conviction was predicated upon failure to comply with the contractual commitments for the return of the goods and parts or pieces thereof in all its altered forms not used in the production of the Eisenhower jackets made and delivered. The Government later conceded, during the course of a civil action involving the same matters, that it could not prove "how much was scrap and how much was yardage" of the material which it claimed was not returned.**

One crucial issue in the criminal case, of course, was whether there were any bolts of cloth, or for that matter

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* In a subsequent civil case involving the same matters in the Eastern District of New York, Judge MISHLER noted:

"Fabric received 578,147 yards of 55" cloth and 141,336 yards of 56" cloth [total of 719,483 yards]. The cloth was first quality wool serge and in good condition, except for certain mill defects in parts of the bolts, to which reference will be made.

Fabric performed services on the cloth pursuant to the contracts aforementioned and delivered 454,814 Eisenhower jackets to the Agency."

** "The Court: Well, let me say this: I deem this as the critical part in the Government's case because Mr. Golden indicated that they could not prove how much was scrap and how much was yardage, if indeed they could prove a conversion at all. Am I correct in that Mr. Golden?

Mr. Golden: I don't think I can establish how much was scrap.

The Court: That's right; this is the difficulty."

any usable yardage at all, which remained after filling the Government orders. In view of the foregoing admissions made by the Government on the trial of the civil case, the validity and legitimacy of the prior conviction so frequently noted by the Government here is seriously called into question. Similarly, developments in the civil action cast grave doubt upon crucial Government testimony at the criminal trial, where cloth was exhibited which was claimed to have been Government goods which were sold by petitioner. During pre-trial examinations had in the civil action, it was indisputably shown that this cloth was 58" in width and not 56", the maximum width of the cloth claimed to have been delivered to petitioner and "stolen" by him. On his examination before trial FBI Agent Mulderig refused to measure the allegedly stolen Government cloth with a Government ruler, which cloth, when measured by petitioner in the presence of that FBI Agent and Government counsel proved to be at least 2" wider than any cloth claimed to have been delivered to petitioner.*

The Petition Was Timely

The Government complains that both the instant petition and the appeal below were untimely (Mem., p. 4); this objection is without merit. An application for a writ of error *coram nobis* is an "independent civil suit". See *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7 (1959). This applica-

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* The record of the examination of FBI Agent Mulderig shows as follows:

"Q. Did you measure the goods, these exhibits, to ascertain whether they fell within the width specified, as you have indicated, between fifty-five and fifty-six inches?

MR. MELTZER: You are asking Mr. Mulderig?

MR. GOTTLIEB: Yes.

A. No, I did not.

* * *

"Q. Now I want to know: Here is this piece of goods that according to the exhibit number has remained in your possession since January 1953. Have you ever taken the trouble to measure its width? A. No, I have not.

Q. Not up until this time? A. Not this time either.

tion, brought some four years after entry of the judgments sought to be vacated, was treated below as an independent *civil proceeding* from the outset—by the Government and the courts as well as by petitioner. This matter was called on the *Civil Calendar* of the United States District Court for the Eastern District of New York (4a) and was assigned its own *civil docket number* (1a). Indeed, the District Court found that reference to Rules 32(d) and 35 of the Federal Rules of Criminal Procedure in petitioner's motion papers was "incorrect" (119a; Pet.'s Appendix, p. 35).

Q. So you are not in a position to dispute that it is fifty-eight inches wide, are you? A. I am not in a position to state what width it is.

Q. *Do you want, as a matter of simple justice, to use a ruler and find out what its width is right here and now?* A. *No, I don't.*

* * *

"MR. GOTTLIEB: I have a right to ask the witness to take the measurement.

MR. MELTZER: Again, I am directing him not to do it.

MR. GOTTLIEB: Mr. Abrams, will you be good enough to take a ruler, right in the presence of these gentlemen, and measure this, the ruler supplied by Mr. Meltzer's office. Do you have any objection to my using your ruler, or do you claim it is inaccurate?

MR. MELTZER: If you want to represent that this is fifty-eight inches wide, that is all right.

MR. GOTTLIEB: I don't want to represent. I want the ruler to indicate whether it is or it isn't. Let us take the first exhibit.

MR. ABRAMS: (After making measurement) It is the width of the desk plus seven and a half inches.

MR. GOTTLIEB: Now, please measure the width of the desk. The spreading of the goods indicates that it is nine and a half inches less than the width of your desk, Mr. Meltzer.

MR. MELTZER: Mr. Gottlieb, if my desk has to appear in court, it will have to be your agent or employee who will bring it down.

MR. GOTTLIEB: The width of the desk is sixty-seven and a half inches wide, and nine and a half inches from that is fifty-eight inches. That is R-2. R-1 shows eight and a half inches less than the width of the desk or, as we calculate it to be, a width of approximately fifty-nine inches. These measurements, Mr. Meltzer, are subject to your verification with a tape measure, and there can be, I am certain, no dispute between us as to what the physical measurements are."

The docket entries reveal that the order of the District Court denying petitioner's application to set aside judgments of conviction was filed on January 22, 1965 and that petitioner's Notice of Appeal was filed on March 19, 1965 (3a), within the 60 day period provided by Rule 73(a) of the Federal Rules of Civil Procedure for actions in which the United States is a party. No objection was raised by the Government to the timeliness of the appeal below, nor did the court below find the appeal untimely, but went to the merits as it was required to do. See *Hixon* v. *United States*, 268 F. 2d 667 (10 Cir. 1959); *United States* v. *Scarlata*, 214 F. 2d 807 (3 Cir. 1954).

In this Court the provisions of 28 U.S.C. §2101(c) govern; the petition was filed well within 90 days of entry of judgment below as provided in that rule.* As was said in *United States* v. *Morgan*, 346 U.S. 502, 505 (1954) "* * * Federal courts should act in doing justice if the record makes plain a right to relief."

Petitioner's application for certiorari should be granted.

Respectfully submitted,

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* The Government's complaint comes with rather poor grace after it had sought and received from petitioner consent to two 30 day extensions of time in which to file its answering memorandum.